EASTERN ENTERPRISES LTD. v. ONG CHOO KIM

[O.C.J. (Winslow J.) March 20, 1969]

[Singapore — Suit No. 117 of 1966]

Landlord and Tenant — Statutory tenant — Allegation that tenant had been using or permitting the use of premises for illegal or immoral purposes — Standard of proof — Evidence Ordinance (Cap. 4), s. 3 — Control of Rent Ordinance, (Cap. 242), s. 15(1)(d).

Landlord and Tenant — Order for possession against tenant — Position of subtenant — Declaration whether order is enforceable against subtenant or not — Practice — Control of Rent Ordinance (Cap. 242), s. 26(1).

Evidence — Standard of proof to be applied in civil proceedings — Allegation of running a brothel or permitting premises to be so used — Quantum of proof required to prove allegation — Onus of proof.

In this case the plaintiffs, the owners of the premises, had obtained a consent order for possession against the original tenants. No declaration was made as to the enforceability of the order against the defendant, who was then the subtenant. Subsequently the plaintiffs sought an order for possession against the defendant and contended that the defendant was not entitled to claim protection under the Control of Rent Ordinance on the ground that the defendant or persons occupying the premises under him, has or have been guilty of using or permitting the use of the said premises for immoral purposes.

Held, dismissing the claim: (1) as the consent order against the original tenant could not be enforced against the defendant who was the subtenant, he became the statutory tenant of the plaintiff from the date of the consent judgment against the original tenant;

(2) in this case the plaintiffs had to establish their allegation against the defendant on a balance of probability subject to the qualification that in tilting the balance against the defendant they must attain a higher degree of probability than is required in an ordinary case of civil negligence though not the very high standard of the criminal law;

(3) as the plaintiffs had failed to prove their allegation against the defendant therefore their claim failed.

Cases referred to:—

(1) *Tan Joo Eng (m.w.)* v. *Siang Heng Co. Ltd. & Ors.* [1957] M.L.J. 18.

(2) *Ng Eng Kang* v. *R. Sitharam & Anor.* [1952] M.L.J. 155

(3) *Loh Peck Hoo* v. *Yip Lim* [1967] 1 M.L.J. 112.

(4) *New York* v. *Heirs of Phillips Decd.* [1939] 3 All E.R. 952.

(5) *Doe. de Devine* v. *Wislon* (1855), 14 E.R. 581 at p. 592.

(6) *Narayanan Chettyar & Anor.* v. *Official Assignee* A.I.R. 1941 P.C. 93 p. 95.

(7) *Helton* v. *Allen* (1940), 63 C.L.R. 691.

(8) *Ellis* v. *Frape & Ors.* [1954] N.Z.L.R. 343.

(9) *Hanes* v. *Wawanesa Mutual Insurance Co.* (1936), 36 D.L.R. (2d).

(10) *Bater* v. *Bater* [1950] 2 All E.R. 458.

(11) *Rejfek & Anor.* v. *McElroy & Anor.* (1965), 39 A.L.J.R. 177.

(12) *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247.

(13) *Tan Chye Chew & Anor.* v. *Eastern Mining & Metals Co. Ltd.* [1965] 1 M.L.J. 201.

(14) *Nederlandsche Handel-Maatschappij N.V.* v. *Koh Kim Guan* [1959] M.L.J. 173.

(15) *Ratna Ammal* v. *Tan Chow Soo* [1967] 1 M.L.J. 296.

(16) *Tikan bin Sulaiman* v. *R.* [1953] M.L.J, 131.

(17) *Public Prosecutor* v. *Alang Mat Nasir* [1938] M.L.J. 147.

(18) *Liversidge* v. *Anderson* [1942] A.C. 206.

CIVIL SUIT.

D.E.S. Chelliah for the plaintiffs.

L.A.J. Smith for the defendant.

Cur. Adv. Vult.

Winslow J.: The plaintiffs claim possession of the land and premises known as No. 3 Branksome Road, Singapore of which they are now the landlords and the defendant the tenant. The said tenancy was determined by a notice to quit dated 29th October, 1965. The plaintiffs' contention is that the defendant is not entitled to claim protection under the Control of Rent Ordinance (Cap. 242) on the ground that the defendant or any other person or persons occupying the premises under him has or have been guilty of using or permitting the use of the said premises for illegal or immoral purposes.

The defendant denies that the plaintiffs are entitled to recover possession on this ground or at all and denies in particular that the premises had ever been used as a brothel or were currently being used as a brothel or for illegal or immoral purposes. The defendant further admits receiving the notice to quit dated 29th October, 1965. The defendant has also filed a counter-claim for certain sums of money alleged to have been paid to the plaintiffs in excess of that lawfully due. But since the standard rent of the premises, *viz.*, $150 per month is not in dispute, I was informed by counsel for the parties that I need not be concerned with this aspect of the matter at this stage. The plaintiffs concede that the defendant is entitled to $4,000 from tht plaintiffs but that the plaintiffs are entitled to set off against this amount a sum of $150 per month.

The sole issue, therefore, with which I am concerned in this action, is whether the evidence aduced on behalf of the plaintiffs taken in conjunction with the evidence of denial of illegal or immoral user of the premises satisfies me that the premises were used or permitted to be used for illegal or immoral purposes before the issue of the writ on 28th January, 1966. If so, the plaintiffs would be entitled to recover possession.

A preliminary objection was taken at the commencement of the hearing by Mr. L.A.J.

Smith, counsel for the defence, to the introduction of any evidence relating to such user prior to 27th October, 1965, the date on which a judgment by consent in Suit No. 1457 of 1965 was obtained by the plaintiffs against Hardial Singh, who was then the principal tenant whilst the present defendant was merely his sub-tenant. In that suit the plaintiffs had sought to recover possession from Hardial Singh on two grounds, one of which alleged illegal or immoral user. The consent judgment, however, proceeded on the basis that this ground was disputed, Hardial Singh having consented with regard to the other ground with which I need not be here concerned. Mr. Smith accordingly argued that, by virtue of that judgment which contained no declaration under section 26 of the Control of Rent Ordinance whether that judgment was or was not enforceable against the present defendant, no evidence could be given in the present action of events relating to user before 27th October, 1965. As against this submission, Mr. D.E.S. Chelliah, counsel for the plaintiffs, argued that that order of court was interlocutory only, that the plaintiffs had not abandoned the ground of illegal or immoral user, that Suit No. 1457 of 1965 was still outstanding and that when that suit is finally determined, the court would direct its mind to whether the order should be made enforceable against the sub-tenant. It should be remembered that the defendant's attention was drawn to the consent judgment, a copy of which was forwarded to his counsel on 29th October, 1965 (see AB57) and that in this present action, he is being sued as tenant and not as sub-tenant.

Section 26(1) of the Ordinance provides as follows:—

> "Where any order or judgment for the recovery of possession has been obtained against any tenant of premises, such order or judgment shall not be enforceable against any sub-tenant of such tenant unless the court is satisfied that such tenant was prohibited by the terms of his tenancy from sub-letting or that such sub-tenant has used the premises for illegal or immoral purposes. Every order or judgment for possession made against any tenant shall declare whether it shall be enforceable against any sub-tenant or not."

No declaration was, however, made in Suit No. 1457 of 1965. The sub-tenant at the time, who is the present defendant, was never before the court and no evidence was ever led before it to satisfy it that he had used the premises for illegal or immoral purposes. The court accordingly had no material on which it could declare the judgment to be enforceable against him and no application was ever made then to make the order enforceable against him. Moreover, the sub-tenant was never a party to those proceedings. In the circumstances the court was not required to, nor did it nor could it, in fact, direct its mind to whether its order for recovery of possession against the tenant, Hardial Singh, should be made enforceable against the sub-tenant on the ground that such sub-tenant had used the premises for illegal or immoral purposes although the court, from the pleadings, must have been aware of the existence of such sub-tenant.

On the authority of *Tan Joo Eng (m.w.)* v. *Siang Heng Co. Ltd. & Ors.*[1] the sub-tenant on receiving notice of the order could have applied for leave to appear and defend the action which leave would ordinarily have been granted on his showing that he was in possession of the premises in respect of which an order had been signed and that he had been given no notice of the proceedings before judgment. The question however arises whether he was under any obligation to do so in the absence of any declaration that the order was enforceable against him. In my opinion, there was no such obligation on his part and his position is quite different from the position of the sub-tenant in *Ng Eng Kang* v. *R. Sitharam & Anor.*[2] where there was in fact such a declaration, however wrongful that declaration might have been.

As the order of court dated 27th October, 1965 is silent on whether or not it could be enforced against the sub-tenant, the question arises as to whether the sub-tenant should be put into the position of having to show that he had not used the premises for illegal or immoral purposes. It is clear from the wording of section 26 of the Ordinance that the onus is on the landlord to show that the sub-tenant had, in fact, been so using the premises. In the absence of a declaration that the order was enforceable against the sub-tenant, the order was, in effect, unenforceable against him even though the order does not say so in positive terms. If I am right in concluding that the failure of the landlord to prove such user on the part of the sub-tenant must necessarily result in rendering the order unenforceable against the sub-tenant, then it follows that the sub-tenant is under no obligation at all to satisfy the court that the order should remain unenforceable against him for the simple reason that the landlord has not discharged the initial burden on him of proving illegal or immoral user.

I am therefore of opinion that, unless, in a case like Suit No. 1457 of 1965, the court has made an order enforecable against a sub-tenant, then that order remains unenforceable against him and that as from the date of the order, the sub-tenant becomes the statutory tenant of the landlord under section 26(2) of the Ordinance. I therefore hold that the defendant in the pre-

sent action, who was the sub-tenant in Suit No. 1457 of 1965, became the statutory tenant of the plaintiffs on 27th October, 1965.

I would add that the court originally making an order against a tenant is the court which should hear any application under section 26 and that if no action is taken to invoke that court's jurisdiction against a sub-tenant after it has already heard the tenant then the proper course is *not* to commence fresh proceedings in another suit against the sub-tenant as a tenant, but to get him before the court somehow in the same original suit and, if possible, before the same judge who made the order against the tenant in the first place.

I can find no authority for saying that the plaintiffs can commence proceedings against a tenant in one suit and then go back after succeeding before another judge in a subsequent suit to the original court which decided the matter against the tenant and ask for an order against the sub-tenant on the basis of a judgment in the subsequent suit in which he has succeeded against the defendant, not as sub-tenant, but as tenant. It is clear from paragraph 3 of the statement of claim herein that the present defendant was no longer regarded as a sub-tenant after 27th October, 1965 but as a tenant. The plaintiffs have elected to regard him as a tenant and they are bound by their election. How they can ever hope to go back to the court in Suit No. 1457 of 1965 and ask successfully for him to be regarded as a sub-tenant for the purposes of section 26, after possible success against him as a tenant here, bogs imagination.

As I have already said the only sensible way to look at the matter is to regard the defendant as a statutory tenant from 27th October, 1965.

After hearing the preliminary objection by Mr. Smith for the defence, I decided nevertheless to hear the evidence of events prior to 27th October, 1965 since the case had been fixed initially for two whole days, reserving to myself the right to exclude such evidence from my mind should I subsequently hold that the preliminary objection was well taken.

I was informed from the Bar that a situation like this had never arisen before. In one way I was not surprised because had a consent judgment not been obtained in the first instance against Hardial Singh (the tenant) on another ground and had the attention of the court hearing that action been directed to the provisions of section 26 and had an application been made to join the sub-tenant as a defendant all these difficulties would not have arisen.

In my opinion, the proper course would have been to join the present defendant as a defendant in that action.

I do not think the present proceedings should ever have been brought as a convenient alternative to proceedings against the sub-tenant in the previous suit particularly where illegal or immoral user had been alleged on his part. One can become wiser after the event but that does not exonerate a party from responsibility for adopting the wrong course. Even Mr. Chelliah, counsel for the plaintiffs, submitted that under Order 12 rule 12, he could have joined the defendant in the previous suit. I am not so sure about this because Order 12 rule 12 only empowers a person not named as a defendant in a writ to obtain leave to appear and defend. But I think Mr. Chelliah is certainly right in saying that he could have joined the sub-tenant. This he would have done when he issued his writ in the previous suit or at the worst, after obtaining the consent order against Hardial Singh, he should have applied to the trial judge for an order under section 26 against the sub-tenant in which case I have no doubt the sub-tenant would have been given an opportunity of being heard.

I would stress that, in all cases for recovery of possession where section 26 of the Ordinance is likely to be invoked against a sub-tenant, a firm application should be made to the court of trial for a sub-tenant who has not already been joined as a defendant to be added as a defendant in order that the question whether an order against the tenant should be made enforceable against the sub-tenant may be considered and, if necessary, made.

To revert to the preliminary objection, in view of my finding that the defendant herein became a statutory tenant of the plaintiffs on 27th October, 1965, I have no alternative except to hold that evidence of acts prior to that date should be excluded from consideration in the present action. This would suffice to dispose of the plaintiffs' claim, without further ado, because there was no evidence adduced before me of illegal or immoral user of the premises by the present defendant between 27th October, 1965 and the issue of the writ against the defendant on 28th January, 1966. Assuming, however, that, for some reason, it is considered that I am wrong with regard to the preliminary objection and that evidence of acts prior to 27th October, 1965 can properly be taken into account in determining whether the defendant or any person or persons occupying the premises under him was or were guilty of using or permitting the premises to be used for illegal or immoral purposes, I propose to deal briefly with such evidence as the plaintiffs were able to adduce on these matters.

Before I proceed to evaluate the evidence in this regard, it is essential to determine the standard of proof which a plaintiff in a civil case should attain where he alleges facts in a civil proceeding which constitute a crime.

In *Loh Peck Hoo* v. *Yip Lim* [3] Choor Singh J. in delivering oral judgment in a similar action was of opinion that:—

"The expression 'guilty . . . . of using or permitting the use of the premises for illegal or immoral purposes' appearing in paragraph (d) of section 15(1) of the Control of Rent Ordinance means guilty beyond a reasonable doubt."

No authorities seem to have been cited to him or referred to in his short oral judgment and certainly at one time the decision of the Privy Council *per* Lord Atkin in *New York* v. *Heirs of Phillips Decd.* [4] gave rise to the view that that was the proper standard to be attained where conspiracy was alleged in a civil proceeding. Lord Atkin said in the course of his judgment:—

"The trial judge, Mercier J., considered afresh the whole of the evidence. The only complaint made of his judgment in point of law is that he laid down that there was a heavy onus on the plaintiffs and that it was necessary for them to prove their case as clearly as they would have to prove it in a criminal proceeding. Their Lordships consider this criticism to be ill-founded. The proposition of the judge has been laid down time and again in the courts of this country: and it appears to be just and in strict accordance with the law."

But the Privy Council in a previous case in *Doe d. Devine* v. *Wilson* [5] held *per* the Right Hon. Sir John Patterson that:—

"Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the onus of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the onus of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted."

Again in 1941 Lord Atkin in *Narayanan Chettyar & Anor.* v. *Official Assignee, Rangoon* [6] said:—

"Fraud of this nature, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt."

Before turning to the English and local decisions on this subject, I should like briefly to deal with the position in some of the other parts of the Commonwealth like Australia, New Zealand and Canada. The Privy Council decisions to which I have referred were critically examined by the courts of most of these countries and the present trend there is to follow *Doe d. Devine* v. *Wilson* rather than the the subsequent pronouncements by Lord Atkin.

In *Helton* v. *Allen*, [7] Dixon J., Evatt J. and McTiernan J. of the High Court of Australia were of the view that:—

"In using the expression 'as clearly as in a criminal proceeding' Lord Atkin may have had in mind the exactness of the proofs rather than the standard of persuasion or certainty. But in any case it is impossible to treat the observation as overriding *Doe d. Devine* v. *Wilson* and a line of cases and authority."

In *Ellis* v. *Frape & Ors.* [8] Hay J. in the Supreme Court at Wellington held:—

"Having regard to the paramount authority of the Privy Council, so far as New Zealand is concerned, it is important in the first place to ascertain whether there is a rule in unmistakable terms laid down by that tribunal, and, unfortunately, that cannot, in my opinion, be said to be the case, in spite of the plain and unambiguous words used by Lord Atkin in the Indian case of *Chettyar* — namely: 'Fraud of this nature, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt.' The case with which the Judicial Committee was there dealing was one of fraud, and it is no doubt true (as stated by Townley J. in *Origliasso* v. *Vitale* ([1952] Q. S.R. 211) that the words of Lord Atkin are *obiter* in so far as the dictum extended beyond fraud to criminal offences generally; but, if the dictum is binding in relation to fraud, it is difficult to see why it should not apply to other crimes alleged in civil proceedings. On the other hand, the dictum is a bald statement without discussion, and, in particular, without reference to the weighty pronouncement by the same tribunal in *Doe d. Devine* v. *Wilson*."

In *Hanes* v. *Wawanesa Mutual Insurance Co.* [9] the Supreme Court of Canada held, following *Doe d. Devine* v. *Wilson*, that the proper test to apply was the "balance of probability" test and approved the observations of Denning L.J. (as he then was) in the English case of *Bater* v. *Bater* [10] where he said:—

"A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

Finally, in Australia in *Aejfek & Anor.* v. *McElroy & Anor.* [11] Barwick C.J., Kitto, Taylor, Menzies and Windeyer JJ. said:—

"But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of

certainty which is indispensable to the support of a conviction upon a criminal charge."

I now turn to the position in England. *Hornal* v. *Neuberger Products Ltd.*[12] seems to have settled the law on the subject there for the time being. The county court judge had held on a claim based on fraud that he was satisfied on the balance of probability that a fraudulent misrepresentation had been made, and that that was the correct standard to apply but that he would not have been so satisfied if the criminal standard of proof was to be applied. The Court of Appeal held that the judge had applied the correct standard of proof. Denning L.J. at page 258 went on to say:—

"Nevertheless, the judge having set the problem to himself, he answered it, I think, correctly. He reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law."

At page 260 he elaborated this as follows:—

"The Judge took great pains to consider the cases in which the question he posed had been considered. I do not propose to follow him in their review, agreeing as I do with his conclusion. I agree with him that in most civil cases, where the standard of proof in cases involving crime has been mentioned, there has been no argument, and the heavier burden of proof has been accepted by counsel or assumed as necessary by the judge."

It should be remembered that in *Bater* v. *Bater* to which I have referred earlier, Denning L.J. had said:—

"The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best C.J., and many other great judges have said 'in proportion as the crime is enormous, so ought the proof to be clear.' So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard."

It remains for me to refer to the position in Singapore and Malaysia. The Federal Court sitting in Singapore held in *Tan Chye Chew & Anor.* v. *Eastern Mining And Metals Co. Ltd.*[13] that a high standard of proof is required in a civil suit where fraud is alleged and in this respect approved Rose C.J.'s decision in *Nederlandsche Handel-Maatschappij N.V.* v. *Koh Kim Guan* [14] which he heard as a judge at first instance. After reviewing the authorities, Rose C.J. at p. 175 summed up the position in the following words:—

"Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require a high standard of proof in cases where fraud is alleged."

The Federal Court proceeded to apply that standard in considering whether there was sufficient evidence to support the finding of fraud. Two other cases, *viz.*, *Hornal's* case and *Bater's* case which I have mentioned earlier, were also referred to as having used various expressions to indicate that an allegation of fraud in a civil case must be proved to a high degree of probability, "a degree of probability which is proportionate to the subject matter" or "commensurate with the occasion".

In 1967, in Malaysia, the Federal Court sitting in Penang in *Ratna Ammal* v. *Tan Chow Soo*,[15] after referring to *Bater's* case and the case decided by Rose C.J. in Singapore, approved the principle to be extracted from these cases as requiring a higher degree of probability to be established in a civil case where fraud and criminal conspiracy are alleged than when the court is asked to determine whether negligence has been established.

It will be noted that the Federal Court in Singapore in 1965 and the Federal Court in Penang in 1967 reached their conclusions on this matter after reference to *Hornal's* case, *Bater's* case and the *Koh Kim Guan* case without allowing themselves to be drawn into the controversy surrounding Lord Atkin's observations in either the *New York* case or the *Chettyar* case in the Privy Council and, by implication, did not consider themselves bound by Lord Atkin's pronouncement in the latter that "fraud of this nature, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt." In *Koh Kim Guan's* case which was cited to the Federal Court sitting in Singapore in 1965 Rose C.J. referred to the *New York* case and the *Chettyar* case as well as *Hornal's* case and *Bater's* case but unfortunately the case of *Doe d. Devine* v. *Wilson* was not, presumably, cited in argument before him because he makes no reference to it in his judgment. As I have already pointed out earlier, Hay J. in Wellington held that Lord Atkin's pronouncement in the *Chettyar* case was a dictum which was a bald statement without discussion, and, in particular, without reference to the weighty pronouncement by the same tribunal in *Doe d. Devine* v. *Wilson*. It should also be noted that *Hornal's* case which was considered by Rose C.J. makes no mention either of the two Privy Council cases, which I have just mentioned, or of the decision in *Doe d. Devine* v. *Wilson*. The Federal Court in Singapore also considered *Hornal's* case but it would be interesting to know whether it would have reached the same conclusion in approving

the principle enunciated by Rose C.J. that a high standard of proof would be required to establish fraud in civil proceedings if all the three Privy Council cases had been drawn to its attention.

The Federal Court in Penang in 1967, however, referred only to *Bater's* case and the *Koh Kim Guan* case and, without necessarily adopting the words of Rose C.J. about a high standard of proof in civil cases where fraud is alleged, nevertheless, adopted the higher degree of probability test suggested by Denning L.J. in *Bater's* case i.e., that a civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. Azmi C.J. then proceeded to cite from Denning L.J. as follows:—

> "It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it does require a degree of probability which is commensurate with the occasion."

Before proceeding to propound my own views on the quantum of proof required to establish that the premises in question in the case before me were being used or permitted to be used for illegal or immoral purposes, I would draw attention to the provisions of section 3 of the Evidence Ordinance. As Murray-Aynsley C.J. pointed out in the Court of Criminal Appeal in *Tikan bin Sulaiman* v. *Regina* [16] that section gives a definition of "proved" as follows:—

> "A fact is said to be proved when, after considering the matters before it the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

The court further went on to say that the Evidence Ordinance only lays down one standard of proof, whether the burden is on the prosecution or the defence and thought that:—

> 'The practice of directing the jury that the Crown must prove its case beyond reasonable doubt, in so far as it imposes on the Crown a burden higher than that imposed by the Evidence Ordinance, is only a matter of practice, like the direction given concerning the evidence of accomplices."

Section 3 was also considered by the F.M.S. Court of Appeal in *Public Prosecutor* v. *Alang Mat Nasir.*[17] Gordon-Smith J. said that "it would be highly undesirable for this court to attempt to lay down or define any degrees or quantum of proof which should establish a reasonable doubt" — as to the sanity of an accused person — "and as stated in section 3 of the Evidence Ordinance it depends on the circumstances of the particular case." Whitley Ag.C.J. said:—

> "In a civil action the merest tipping down of the scales in one direction or the other may be sufficient to decide the issue. A prudent man, called upon to decide upon a matter in which so much is at stake, would act wisely and properly in allowing himself to be guided by an authoritative opinion such as that; . . . . When framing the question which he referred for our determination in the two cases which we are considering, the learned judge apparently had not in mind the definition of "proved" in section 3, but he found in each case that the evidence did raise a reasonable doubt in his mind as to whether or not the accused was insane when committing the act complained of; and it seems to me that a prudent man, feeling such a doubt as that based as it is upon such a very definite and weighty expert medical opinion, and bearing in mind the lesser degree of proof required in such a case and the consequences which depended upon his decision, would consider the existence of insanity so probable — and I think the word 'so' here must be read in the sense of 'sufficiently' — that he ought under the circumstances to act upon the supposition that insanity existed. That being so the 'fact' of insanity has in my opinion been 'proved' within the definition in section 3."

Although at first sight no distinction seems to be drawn between different standards of proof by the Evidence Ordinance it seems to me that the wording of the definition of "proved" itself gives the clue to the degree of probability which a prudent man should set himself before he finds any particular fact to be proved. A court should, after considering the matters before it, either believe it to exist or consider its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists. The emphasis is therefore on the expressions "after considering the matters before it", "so probable" and "under the circumstances of the particular case". As Whitley Ag.C.J. said at p. 149, "the definitions in section 3 are so worded as to render possible a reasonable degree of elasticity in applying them, and when considering how we should apply them in any particular case, it is proper that we should invoke the assistance of authoritative decisions in England." His Lordship did not however refer to the decisions of the Privy Council. In 1938 however the Privy Council had not yet propounded the observations which Lord Atkin later made in 1939 and in 1941 and in any case those observations were irrelevant to the question of the standard of proof for insanity on the part of an accused person. But *Doe d. Devine* v. *Wilson,* if considered, could well have reinforced his view.

I have been at some pains to deal exhaustively with the question of the standard of proof to be applied in a civil proceeding such as the one before me in which an allegation of illegal or immoral user of premises has been made against the defendant by the plaintiffs for a special reason. The allegation is not one of fraud or conspiracy or forgery or some crime

of a similar nature with which most of the authorities I have cited were mainly concerned despite dicta extending the same standard to allegations of other crimes in civil proceedings. Moreover, using or permitting premises to be used for illegal or immoral purposes is not in itself a specific crime (see *Megarry's Rent Acts*, 9th Edition at 245/246). As the author, however, points out in a footnote, permitting premises to be used as a brothel or for the purposes of habitual prostitution is an offence under English law. In Singapore it is an offence under section 133 of the Women's Charter (Ordinance No. 18/61) for any person to keep or manage or assist in the management of a brothel and for various other persons such as tenants, lessees, occupiers or persons in charge of any place which is used as a brothel to be guilty of an offence unless such person proves that he has no knowledge of such use.

The allegation by the plaintiffs in the present case is that the defendant has been using or permitting the premises in question to be used for immoral purposes and it could be argued that this is an allegation of a grave character almost on a par with alleging that the defendant has been running a brothel or permitting it to be so used. The question next arises as to the quantum of proof required to prove this allegation, the onus being clearly on the plaintiffs. Although this is strictly not an allegation of an offence under section 133 of the Women's Charter, it comes dangerously close to it. If a person is guilty of running a brothel, he is certainly guilty of using the premises for immoral purposes. Conversely, a person guilty of the latter allegation may not be guilty of running a brothel. A tenant, lessee or occupier, etc. of premises used as a brothel is however guilty of an offence unless he proves that he has no knowledge of such use. An allegation of permitting premises to be used for immoral purposes seems to me to be a serious allegation though perhaps not quite as serious as one alleging that premises have been permitted to be used as a brothel.

Without splitting hairs it seems sufficiently clear that the allegation of the plaintiffs in this case is of a sufficiently grave character to amount to an allegation of a criminal nature notwithstanding that the allegation has not been propounded in the specific terms of the offences created by section 133. It follows, therefore, that the degree of proof which must be attained by the plaintiffs need not be as high as that of proof beyond reasonable doubt as is required by a criminal court but the degree of probability required is one which must be commensurate with the occasion and proportionate to the gravity of the issue involved.

I would therefore conclude for purposes of this action that the plaintiffs must establish their allegation against the defendant on a balance of probability as laid down by *Doe d. Devine* v. *Wilson* subject to the qualification that in tilting the balance against the defendant, they must attain a higher degree of probability than is required in an ordinary case of civil negligence though not the very high standard of the criminal law. Although the difference in the standards of proof in civil and criminal cases "may well turn out to be more a matter of words than anything else" (*per* Denning L.J. in *Bater's* case), the Australian High Court in the *Rejfek* case held that it was no mere matter of words but a matter of critical substance.

The crux of the matter seems to me that, in deciding how high the standard of proof should be short of proof beyond reasonable doubt, the court should act on its own good sense, having regard to the realities of the situation and apply that standard short of certainty which enables it to be reasonably satisfied that a grave allegation in the course of civil proceedings has been substantiated since there is obviously no precise mathematical formula which it can apply.

I now turn to the facts alleged in support of the plaintiffs' case.

On 19th April, 1965 the Director of Social Welfare in purported exercise of the powers conferred on him by section 134(1) of the Women's Charter, 1961 caused a notice to be served on the plaintiffs as owners of the premises in question. In this notice the Director stated that he was causing it to be served on the plaintiffs:—

> "Whereas it has come to my knowledge that the premises 3 Branksome Road are being used as a brothel".

Section 134(1), however, provides that the Director may serve such a notice where he has reason to believe that a place is being used as a brothel. One can only assume that the Director intended to state that he had reason to believe that the premises were being used as a brothel because it had come to his knowledge that this was so. He has, however, not stated this in the words of the section. Be that as it may, the plaintiffs rely to some extent on this notice as evidence that the premises were being used as a brothel.

It is well-known that where police or the executive are empowered to take action on the ground that they have reason to believe a certain state of affairs to exist, the objective test must be applied in deciding whether they do in fact have "reason to believe." The courts can inquire into the grounds of their belief but

they cannot do so in cases where the legislature has entrusted discretionary powers exclusively to the executive. Then the subjective test applies and the courts are shut out. Cases of the latter kind arise where the legislature has used expressions such as "if it appears to the . . . ." or "if the . . . . is of the opinion that . . . ." or "if the . . . . is satisfied" where it is clear from the context of the particular legislation that the matter rests entirely on the personal belief of the ministerial officer concerned even if based on hearsay or dictated by a question of policy. If authority is needed for this proposition it will be found in *Liversidge* v. *Anderson* [18] and in the numerous local cases interpreting our security laws where it has been held that an exclusive discretion has been vested in the executive which the courts cannot investigate or with which they cannot interfere.

Section 134 does not, in my view, confer power on the director to act in accordance with his own personal belief derived through the exercise of any absolute discretion and the fact that he issued a notice to the plaintiffs does not in itself carry any great weight as to the validity of the reasons for his belief that the premises were being used as a brothel. The matter must be looked at objectively to see whether his belief can be substantiated. However, as I have pointed out, he merely says that this fact has come to his knowledge. He does not say that he had reason to believe. A thing can come to someone's knowledge without his necessarily believing or having reason to believe it.

A lady Assistant Director from the Department of Social Welfare was called to show that on 30th October, 1964 a juvenile Malaysian girl from No. 3 Branksome Road saw her and that she conducted an inquiry as a result of which which she sent the girl to Mount Emily Girls' Home because she was in need of care and protection. This officer said that the girl was subsequently discharged to the custody of her father. On this evidence it is not clear under what specific provision of law the director acted in sending her to Mount Emily Girls' Home. Sections 141 to 149 provide for circumstances in which women or girls under 21 may be received into places of safety sometimes at their own request, sometimes at the request of their guardians, sometimes on the director's reasonable belief that a woman or girl is being detained for purposes connected with prostitution or for other immoral purposes and so on. Juvenile girls can also be detained if the director has reason to believe that they have been ill-treated and need protection. It is unfortunate that the officer was not asked to state under what specific provision she took the action which she did and to state more precisely why the girl was detained in a place of safety. There was not one word in her evidence that the girl had been brought to Singapore for purposes of prostitution or for purposes of being used, trained or disposed of as a prostitute. For all I know she may have been brought here for some reason having nothing to do with immorality although a strong suspicion exists that because the premises had been under observation by the Anti-Vice Branch of the C.I.D., she was in need of protection from moral danger. But the witness did not say so nor why she detained her apart from the bald statement that she was in need of care and protection.

It is indeed unfortunate that this was not canvassed in any greater detail and that the girl herself was not called to give any evidence of what actually took place at No. 3 Branksome Road because, if indeed she had been kept in the premises for immoral purposes, satisfactory evidence of such user by the defendant of the premises even on one isolated occasion would have sufficed to prove the plaintiffs' allegation without their proving that the premises were used as a brothel.

The same kind of criticism applies to the rest of the evidence adduced on behalf of the plaintiffs in the sense that not one single witness was called from among the numerous persons who had been found on the premises between May 1963 and April 1965, in the course of 78 raids by the Anti-Vice Branch of the C.I.D., to give evidence with regard to the user of the premises at any time during that period.

Two police officers from the Anti-Vice Branch were called to give evidence, the first of whom merely spoke of knowledge derived from his office file since he only joined that branch in January 1968. He had no personal knowledge of any of the matters relating to the 78 raids I have mentioned. It seems that in the course of all these raids the defendant, Ong Choo Kim, was found on the premises only on one occasion on 28th September, 1963 at 11 a.m.

The other police officer who was called to give evidence was P.W.3, Ong Lian Tatt, who was attached to the Anti-Vice Branch as an inspector between November 1964 and December 1965. He personally took part in a number of raids between November 1964 and April 1965 and the sum total of his evidence was that he suspected the premises of being a brothel and he concluded by saying that there was no evidence to enable him to prosecute. Furthermore, he said no man was ever found in any room there with a woman. He never found a couple in bed at all. He said some appeared to be respectable persons and he could not come to the conclusion that this was a brothel. During the whole of his one year with the Anti Vice Branch, he had had only one

successful prosecution of a brothel-keeper. He recorded statements from two women who had been frequenting premises at different times, and in the course of his investigations, he recorded their occupations as "prostitute", no doubt basing this conclusion on what they told him. Evidence of this kind was rightly objected to because neither of these women could be traced or called as witnesses. He also said that he raided a number of other premises in the same area which he suspected of being brothels and that these women whom he found during his raids on the premises in question had addresses corresponding to the other suspected brothels in the area or had been found there as well. There was also evidence that a number of women found in the premises came from various parts of Malaysia, among other addresses, and that some of the males found therein were seamen.

Emphasis was laid on the fact, in particular, that these two women, named Lim Choi Seng and Sim Lye Neo from whom statements had been taken as self-confessed prostitutes, were found in the premises on various dates around the end of 1964 and in early 1965 and that the police had also found them at other times in other suspected brothels in the area. This, counsel for the plaintiffs said, proved that these women were plying their trade as prostitutes at No. 3 Branksome Road. There was also considerable uncertainty on the part of the police as to whether any of the persons found in the premises during the raids actually lived at No. 3 Branksome Road or not and the evidence was quite inconclusive on this point whereas the defence version was that the defendant was running a lodging-house.

P.W.3, Inspector Ong Lian Tatt, despite participating in about nearly half the total number of 78 raids, was most pessimistic about his chances of success in a prosecution on the evidence he was able to unearth. This is not at all surprising because he never caught any couples red-handed so to speak. He also said that he found the inmates unco-operative. Some of the women said they were prostitutes and some of them changed their statements. He even found some of them to be respectable persons. In this morass of evidence of various numbers of men and women being found in the premises at different times during that period, some of whom were respectable and some of dubious virtue, some of whom were seamen, some of whom were women from Malaysia and about all of whom there was no evidence to show that they were not resident there, there is not one gleam or glitter of evidence to suggest that they were there for immoral purposes to the knowledge of the defendant or any other person in charge of the premises.

The court is being asked to draw the inference that they were there for immoral purposes. Whilst I agree with the police that there are strong grounds for suspecting that the premises were being used for immoral purposes or as a brothel, I have given careful thought to whether the available evidence is such that I can find it proved that they were in fact so used even if one were to apply the lesser level of probability required for an ordinary civil case.

This raises the question as to whether a strong suspicion can amount in the eyes of a prudent man to a probability. To a certain extent it is expected that a court will approach cases of this kind as a reasonable and prudent man would approach it in the light of his own knowledge of human affairs and the realities of everyday life. A prudent man is not necessarily a prude. Nor is he a person, who, like an ostrich, buries his head in the sand in the face of something which is obvious. Faced with the evidence of the kind before me I must try and avoid either being a prude or veering to the other extreme and behaving like an ostrich which pretends not to see the obvious. On the one hand, one can only draw an inference of immoral user if one adopts the standard of a prude when faced with this kind of evidence. On the other hand, can one draw the inference that the premises were so obviously being used for immoral purposes that only an ostrich would hope they were not?

A prudent man would not, however, and should not act by adopting either of these extremes on the available evidence. He would say to himself that there is a very strong suspicion that the premises were being used for immoral purposes and little more. That little more would not tend to satisfy him that the premises were probably so used, and certainly not to that higher degree of probability required, according to the test I have earlier stated, to prove a grave allegation of this nature in a civil proceedings. I accordingly find that the plaintiffs have not discharged the burden of proving a case against the defendant in the first place.

No burden accordingly shifts to the defendant to prove that the premises were not being used for immoral purposes. In short, the defendant would not have to disprove something which has not been proved against him. I appreciate that his own performance in the witness box did not do him very much credit. He did say however that he was running a lodging-house and that all the people in his premises were lodgers. He produced counterfoils of receipts said to have been issued by him to his lodgers which did not ring parti-

cularly true. Perhaps he was trying to avoid tax but was he guilty of immoral user? There was also some query as to why he should have agreed to pay such a high rent as $800 per month to run a lodging-house at the premises. Mr. Chelliah invited me to draw an adverse inference, from the fact of his willingness to pay this high rent, that he must have been looking forward to running and that he did run a very lucrative business at this address such as running a brothel. It should be remembered, however, that he had received compensation of $25,000 for vacating the Ceylon Road premises where he had also conducted a lodging-house but that this litigation had exhausted his resources. He said that he had about 10 rooms to let at No. 3 Branksome Road for lodgers at $60 per month each and that his family lived with him in some of the other rooms.

After careful consideration I have reached the conclusion that that degree of probability sufficient to prove an allegation of this grave nature has not been established to my satisfaction by the plaintiffs despite a valiant and belated attempt made on behalf of the plaintiffs to show that in August 1968, whilst the case was part-heard, the premises were being used for immoral purposes. A private investigator, P.W.5, watched the premises for 5 days and that investigator seemed satisfied that the place was a brothel according to his standards. He formed that view, after seeing the movements of men and women to and from the premises during those 5 days despite the fact that when, as an agent provocateur, he asked for the services of a prostitute he was rebuffed. He also mentioned a person, whom he called Lulu, who had figured as an adulteress in a divorce case on his own evidence. He said she was a prostitute but that was only his opinion as indeed it was about some of the other women he saw going in and out of the premises. As against this, the defendant said that Lulu was living in the premises with a man called Lim Ing San. Evidence of what took place in August 1968, however strong it may be, which it was not, does not help the plaintiffs' case in proving user for immoral purposes either before or after 27th October, 1965 and until 28th January, 1966 when the writ herein was issued.

What I have to ask myself is the question whether, considering all the evidence, even including, if necessary, that of the defendant and that of his witness (who seemed credible), I am reasonably satisfied that the probabilities are in favour of the plaintiffs, applying the standard I have earlier propounded.

I would make one final observation. The police never since they commenced their raids in 1963 to this date have seen fit to question the defendant at all despite the fact that they conducted numerous raids in 1963-1965 and even in 1968.

With sympathy for the difficult task which the plaintiffs face in cases of this kind I must say that they have not so satisfied me.

The plaintiffs' claim accordingly fails and must, on any view, be dismissed with costs.

Claim dismissed.

Solicitors: *Drew & Napier; L.A.J. Smith.*

WONG KUP SING v. JERAM RUBBER ESTATES LTD.

[O.C.J. (Raja Azlan Shah J.) March 21, 1969]
[K.L. — Civil Suit No. 68 of 1968]

Contract — Agreement for sale of land — Time made essence of contract — Reasonable notice of abandonment required — Specific performance.

The plaintiff claimed specific performance of an agreement of sale of a rubber estate entered into between him and the defendants or in the alternative for damages or rescission of the contract. Under the agreement time had been made the essence of the contract, but at the request of the plaintiff the defendants had consented to extension of time for completion on six separate occasions. Eventually the defendants through their solicitors wrote to the plaintiffs on November 15, 1967, insisting that the purchase be completed on the same day. As completion was not made on that day, they wrote to the plaintiff to say that the agreement was terminated. Subsequently the plaintiff offered to complete the contract but the defendants refused, taking the view that the contract was at an end.

Held: (1) once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give reasonable notice of their intention to abandon the contract if the balance is not paid;

(2) in this case the notice of abandonment dated November 15, 1967, was not a reasonable notice and the contract had not been terminated;

(3) in the circumstances the plaintiff had made out a case for specific performance of the contract.

Cases referred to:—

(1) *Barclay* v. *Messenger* (1874), 30 L.T.R. 354.

(2) *Kilmer* v. *British Columbia Orchard Lands Ltd.* [1913] A.C. 319, 322.

(3) *Webb* v. *Hughes* (1870), L.R. 10 Eq. 281, 286.

(4) *Stickney* v. *Keeble* [1915] A.C. 386, 423.

(5) *Tilley* v. *Thomas* L.R. 3 Ch. D. 61.

(6) *Ardeshir* v. *Flora Sasson* A.I.R. 1928 P.C. 523.

The following cases were also cited in argument: *Mayson* v. *Clouet* [1924] A.C. 980; *Howe* v. *Smith* (1884), 27 Ch. D. 89; *In re Dagenham Thames Dock Co.* L.R. 6 Ch. D. 1022; *Stockloser* v. *Johnson* [1914] 1 Q.B. 476 at p. 496; *Steedman* v. *Drinkle* [1916] A.C. 276 and *Richards* v. *Oppenheim* [1960] 1 K.B. 616 at p. 622.